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Supreme Court, U.S.
FILED

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NO. _____ OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JACK CROSS,

Petitioner,

VS.

LUTHER NICHOLS, MARK HENKHAUS, JAMES E. NUGENT, JOHN SHARP AND KENT HANCE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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71PP

QUESTION PRESENTED

1. WHETHER THE TEXAS APPELLATE COURTS ERRED IN AN IMPROPER CONSTRUCTION AND APPLICATION OF FEDERAL LAW TO CROSS' 42 U.S.C. § 1983 CLAIM AGAINST NUGENT, SHARP AND HANCE FOR FAILING TO GIVE HIM A NAME CLEARING HEARING.

2. WHETHER BY HOLDING THAT CROSS' APRIL 30, 1989 LETTER WAS INSUFFICIENT TO STATE A REQUEST FOR A NAME CLEARING HEARING AND BY FAILING TO GIVE CONSIDERATION TO THE EVIDENCE AS A WHOLE, THE TEXAS APPELLATE COURTS MISUNDERSTOOD THE SUBSTANTIVE ELEMENTS OF FEDERAL LAW CONCERNING THE CONSTITUTIONAL RIGHT TO A NAME CLEARING HEARING, DENIED CROSS A FAIR AND REASONABLE OPPORTUNITY TO HAVE THE FEDERAL ISSUE HEARD AND DETERMINED BY THE STATE COURTS AND PUT AN UNREASONABLE OBSTACLE IN CROSS' WAY OF ASSERTING A FEDERAL RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

3. WHETHER BY IMPLICITLY HOLDING THAT THERE IS NO DUTY TO PROVIDE A

DISCHARGED PUBLIC EMPLOYEE SUCH AS CROSS WITH A NAME CLEARING HEARING UNTIL REQUESTED AFTER CRIMINAL CHARGES ARE BROUGHT AND MADE PUBLIC THE TEXAS APPELLATE COURTS HAVE UNDERTAKEN TO REDEFINE AND RECHARACTERIZE THE ELEMENTS OF A FEDERAL CAUSE OF ACTION FOR FAILING TO AFFORD A DISCHARGED PUBLIC EMPLOYEE WITH A NAME CLEARING HEARING.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Jack Cross

Respondents, James E. Nugent, John Sharp and Kent Hance

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Texas entered in this action on June 12, 1997.

OPINIONS BELOW

The decision of the district court is not reported.

The decision of the Court of Appeals is not reported.

The decision of the Supreme Court of Texas is not reported.

All decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of Texas was entered on June 12, 1997. This Court has jurisdiction to review the final judgment of the Supreme Court of Texas pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983.

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called "Cross".

Respondent will be called "Nugent, Sharp and Hance" or "Nichols" or "Henkhaus" as appropriate.

Petitioner Jack Cross was an at will employee of the Texas Railroad Commission from July 17, 1978 until the termination of his employment on April 17, 1989. In the months preceding his termination there had been an investigation launched within the Railroad Commission involving the plugging of wells and other matters. Petitioner Cross was specifically "barred" from the locations where these wells were being re-entered. Various other comments containing inuendos left Cross with the knowledge that when he was terminated on April 17, 1989, that allegations of serious wrongdoing had

been lodged against him and had been actively investigated by the Railroad Commission.

In January 1989 the Texas Railroad Commission had amended the Railroad Commission Employee Handbook to remove all grievance procedures except for those involving "alleged acts of discrimination" including an introductory statement which said:

> "This grievance procedure applies only to complaints about alleged discriminatory personnel practices based on race, color, religion, sex, national origin or physical handicap. If an employee has issues that do not involve discrimination, you should try to resolve the issue by working through the normal supervisory levels in your division."

Following Cross' termination from employment he made several efforts to contact the Commissioners of the Railroad Commission. Among these contacts was a seven page document with attachments styled "Information concerning my Employment Railroad Commission of Texas July 1978 to April 1989 - Jack

Cross" which Petitioner Cross directed to the Railroad Commission on June 1, 1989, which in pertinent part stated:

> "I have tried to appeal my situation through the proper channels of authority as outlined in the latest edition of the Railroad Commission Employee Handbook (January, 1989). I also find that no grievance committee or review board is available to me. (Pages 49 and 50 of the RRC Employee Handbook). (Supplement C). A phone call and registered letters to Commissioners John Sharp, James E. (Jim) Nugent, and Kent Hance of April 21st and April 30th have brought no response as of this date (May 31st), and I have become increasingly frustrated in my efforts of appeal to the Railroad Commission.
>
> . . . .
>
> . . . I am determined in pursuing this matter in whatever manner is available to me becuase (sic) I know that I am innocent of any intentional wrong doing.
>
> I have been told that I have no rights of appeal in the State of Texas, which appears at the present time to be true, but I cannot believe that the Texas Railroad Commission is above the laws of the U.S. Government.
>
> . . . .

Generally, I feel that I was made the "scape-goat" because the Railroad Commission spent around $50,000 in re-entering wells due to poor planning and even worse execution. Because so much money was spent on this "witchhunt", (Bill Ruth and W.E. Skinner both used this term in referring to the re-drilling and investigative operation) Jim Morrow felt like he had to make some kind of final judgment; i.e., my sudden termination in order to justify this huge expenditure to the Commissioners. And, because of the last word spoken to me by phone by Willis Steed on April 17, 1989, - - - "You've spent all that money".

Signed: Jack Cross

Date: June 1, 1989

The RRC, however, had petitioned the TEC for a reversal of Cross unemployment benefits based on new evidence - Jack Cross' indictments in Young County - as being evidence of Cross' misconduct. Based on the indictments the TEC reversed the award of unemployment benefits and ordered Cross to repay the unemployment he had received.

The indictments were given front page publicity in Young County, Texas.

Eventually Cross brought this suit under 42 U.S.C. § 1983 for failure to provide a name clearing hearing.

The Defendants filed motions for summary judgment claiming among other things that the individual defendants were entitled to qualified immunity. The trial court denied the motions for summary judgment, the court of appeals reversed the trial court and the Texas Supreme Court affirmed with a writ denied notation.

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Petitioner filed suit alleging violations of 42 U.S.C. § 1983 involving denial of procedural due process under the Fourteenth Amendment to the United States Constitution arising out of the failure to provide Cross with a name clearing hearing. The defendants filed Motions for Summary Judgment, in part on the basis of

qualified or official immunity. The trial court denied the Motions for Summary Judgment. Defendants took an interlocutory appeal from the denial of their assertions of immunity. The Court of Appeals reversed the trial court holding that the Defendants were entitled to qualified immunity. The Court of Appeals denied Petitioner's motion for rehearing and the Supreme Court of Texas declined Petitioner's Application for Writ of Error with the notation "Writ Denied" on June 12, 1997.

REASONS FOR GRANTING THE WRIT

I. The Texas Courts have applied new and unwarranted requirements to the constitutional right of a public employee to a name clearing hearing by interpreting the right to such a hearing to arise only "after" criminal charges have been brought and made public, following which the employee must specifically require a "name clearing hearing."

This revision of Fourteenth Amendment procedural due process rights works a serious deprivation to the public sector employee in the liberty interest in his name and reputation.

ARGUMENT AND AUTHORITIES

Federal law governs the evaluation of Nugent, Sharp and Hance's assertion of official immunity in this 42 U.S.C. § 1983 claim. *Howlett v. Rose*, 496 U.S. 356 (1990); *USX Corp. v. Champlin*, 992 F.2d 1380, 1385 (5th Cir. 1993); but State law governs the procedure for reviewing the propriety of denial of summary judgment. Generally, to obtain a summary judgment a defendant must either: 1) negate at least one element of the plaintiff's theory of recovery; or 2) plead and conclusively prove each element of an affirmative defense. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). Generally, there is no appeal from a denial of a motion for summary judgment. However, this is a limited interlocutory appeal under the auspices of Tex. Civ. Prac. & Rem. Code Ann. § 51.014(5) (Vernon Supp. 1996) providing that a person may appeal from an interlocutory order of a district court that denies a motion for summary judgment that is based

on an assertion of immunity of an individual who is an officer of the State. The merits of Cross' 42 U.S.C. § 1983 claim were not before the Texas Courts on an interlocutory basis: see, *Fort Bend County v. Heifkkila*, 921 S.W.2d 395 (Tex. App. – Houston [1st Dist] 1996, no writ); *City of Columbus v. Barnstone*, 921 S.W.2d 208 (Tex. App. – Houston [1st Dist] 1995, no writ); and *Cameron County v. Alvarado*, 900 S.W.2d 874 (Tex. App. – Corpus Christi 1995, writ dism'd w.o.j.). Respondents can only prevail in interlocutory appeals like this by conclusively proving each element of an affirmative defense and are precluded from negating one or more elements of the plaintiff's theory of recovery.

As the Court of Appeals stated: "the merits of Cross' 42 U.S.C. § 1983 claim are not before this court on an interlocutory basis; our task is to review the summary judgment proof pertaining to the Commissioners' assertion of the qualified immunity defense." (Op. p. 7).

Regardless, the Court of Appeals found that Nugent, Sharp and Hance were entitled to immunity in this case because: 1) Cross' April 30, 1989 letter was insufficient to state a request for a name clearing hearing; or 2) Cross did not ask for a name clearing hearing after charges were filed against him [by criminal indictment] and made public. The Court of Appeals said that in his April 30, 1989 letter to Nugent, Sharp and Hance he "complained about his termination and asked the commissioners to 'look into this matter,'" but omitted any reference to Cross telling them he was innocent of any intentional wrongdoing; that he was being falsely accused; furthermore, that during this investigation, (he) was told by Austin personnel that (he) would be allowed to answer the allegations made against (him); to date (he) ha(s) not been given this opportunity; no grievance committee or board of review is available to (him); and that (he) was told that (he) had no rights" **before** asking Sharp, Nugent

and Hance to look into this matter. Furthermore, the Court of Appeals did not consider the fact that the Railroad Commission's 1989 Employee Handbook in effect at all times pertinent herein established an entirely new grievance procedure which applied only to complaints about alleged discriminatory personnel practices based on race, color, religion, sex, national origin, or physical handicap. There was no provision for a name clearing hearing, and the explicit language of the handbook negated any right to be heard unless Title VII type discrimination (race, sex, etc.) was being asserted. The failure of the Court of Appeals to consider the entirety of Cross' contacts with the RRC and the failure of the 1989 Employee Handbook to provide for a name clearing hearing is error because the Court of Appeals used an incorrect standard of review failing to take all evidence favorable to the non-movant as true and indulge every reasonable inference in the non-movant's favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex. 1985)

The language in Cross' letter, which the Court of Appeals ignored in reviewing the sufficiency of the letter when it should not have been even looking at the letter, is comparable to the language in *Rosenstein's* letter wherein the Fifth Circuit held that "a discharged employee need not use the term 'name-clearing hearing,'" citing *Owen [v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)] and finding *Rosenstein's* letter sufficient to state a request for a name clearing hearing. [*Rosenstein's* letter is a reference to the case of *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392 (5th Cir. 1989) modified *en banc* 901 F.2d 61 (5th Cir. 1990) *cert. denied* 498 U.S. 855, 111 S.Ct. 153, 112 L.Ed 2d 119.

The Court of Appeals' holding Cross' April 30, 1989 letter to be insufficient to state a request for a name

clearing hearing involves a federal question of substance that appears inconsistent with a prior decision of the United States Supreme Court, namely *Owen [v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)], and a prior decision of the United States Court of Appeals for the Fifth Circuit, namely *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392 (5th Cir. 1989) modified *en banc* 901 F.2d 61 (5th Cir. 1990) *cert. denied* 498 U.S. 855, 111 S.Ct. 153, 112 L.Ed 2d 119. By holding that Cross' April 30, 1989 letter was insufficient to state a request for a name clearing hearing the Court of Appeals misunderstood the substantive elements of federal law concerning the constitutional right to a name clearing hearing, denied Cross a fair and reasonable opportunity to have the federal issue heard and determined by the state courts and put an unreasonable obstacle in Cross' way of asserting a federal right for which due process was to be afforded by

the Fourteenth Amendment to the United States Constitution.

Alternatively or additionally, the Court of Appeals held that Cross did not "ask for a name clearing hearing after the criminal charges were brought (against him) and made public." The Court of Appeals implicit holding that there is no duty to provide a discharged public employee such as Cross with a name clearing hearing until requested after criminal charges are brought and made public involves a federal question of substance that appears inconsistent with prior decisions of this Court, such as *The Board of Regents v. Roth*, 408 U.S. 564 (1972) wherein this Court stated:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."

and the Fifth Circuit in *Wells v. Hico Independent School Dist.*, 763 F.2d 243 (5th Cir. 1984) *cert. denied*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed 2d 672 (1985) and *In Re Selcraig*, 705 F.2d 789 (5th Cir. 1983). By holding that Cross had no right to a name clearing hearing until requested after criminal charges are brought and made public the Court of Appeals has undertaken to redefine and recharacterize the elements of a federal cause of action, and has misunderstood the substantive elements of federal law concerning the right to a name clearing hearing, denied Cross a fair and reasonable opportunity to have the federal issue heard and determined by the state courts and put an unreasonable obstacle in Cross' way of asserting a federal right and created an invalid substantive limitation on a federal right for which due process pursuant to the Fourteenth Amendment to the United States Constitution is

provided. Finally, the Court's implicit finding that Nugent, Sharp and Hance had no duty to afford Cross a name clearing hearing because he did not request one after criminal charges were brought against him and made public constituted an improper review of the merits of Cross' 42 U.S.C. § 1983 claim against them.

The Court of Appeals held that "at all relevant times the Commissioners were exercising their decision making abilities in the furtherance of discretionary, rather than ministerial, duties... and ... that their failure to offer Cross a name-clearing hearing, when they had never been asked to do so, was objectively reasonable. Point of error one [The trial court erred in denying Hance, Sharp, and Nugent qualified immunity] is sustained." (Op. p. 9) The holding is clearly wrong. The right to a name-clearing hearing was a clearly established constitutional right under the prevailing state of the law in 1989 of which a reasonable person would have known,

Rosenstein, *supra* at 395-396, and public officials have neither discretion nor official immunity to violate a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396, 410 (1982).

The Fifth Circuit in *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392, 396 (5th Cir. 1989) modified *en banc* 901 F.2d 61 (5th Cir. 1990) *cert. denied* 498 U.S. 855, 111 S.Ct. 153, 112 L.Ed 2d 119 stated:

The Denial of a 'Name-Clearing' Hearing

> [1-8] It is now beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name. *See Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976); *Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701,

> 2707, 33 L.Ed.2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L.Ed. 216 (1952).
>
> ....
>
> To succeed on this § 1983 claim for the denial of a name-clearing hearing, the employee must prove the following: that he was discharged,[1] that defamatory charges[2] were made against him in connection with the discharge,[3] that the charges were false,[4] that no meaningful public hearing was conducted pre-discharge,[5] that the charges were made public,[6] that he requested a hearing in which to clear his name,[7] and that the request was denied.[8]

Affording a discharged public employee a name clearing hearing is a ministerial duty rather than a discretionary function. *Owen, supra; Rosenstein, supra.* When Cross asserted the violation of a clearly established constitutional right under the prevailing state of the law, Nugent, Sharp and Hance had to conclusively prove that as a matter of law their conduct in denying him a clearly established constitutional right (in this case a

name clearing hearing) was objectively reasonable in light of the law at the time of the conduct in question. Otherwise, if a reasonable official knew that his actions were in violation of a plaintiff's constitutional rights it would lead to a conclusion that the conduct was not objectively reasonable. *Vera v. Tue*, 73 F.3d 604 (5th Cir. 1996) Officials sued in their personal capacities may assert personal immunity defenses such as objectively reasonable reliance on state law. *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Here the Court found that Nugent, Sharp and Hance's failure to offer Cross a name clearing hearing was objectively reasonable without finding that they had violated a clearly established constitutional right of which a reasonable person would know and without summary judgment proof conclusively establishing as a matter of law that their conduct was objectively reasonable, but solely on the basis that Cross failed to request a name clearing

hearing either in his April 30, 1989 letter or after criminal charges were brought and made public.

Nugent's, Sharp's and Hance's affidavits in support of their motion for summary judgment essentially said that they were performing discretionary duties in the scope of their authority in good faith and that though each acknowledged Cross' April 30, 1989 letter they all swore he did not ask for a name clearing hearing. None of them offered any proof that their conduct in failing to afford Cross a name clearing hearing was not a violation of a clearly established constitutional right under the prevailing state of the law and that their conduct in violating a clearly established constitutional right was objectively reasonable in light of the law at the time of the conduct in question.

Their affidavits are insufficient summary judgment evidence to conclusively establish as a matter of law the affirmative defense of "qualified" or "personal" immunity

based on objectively reasonable reliance on existing law. *Hafer, supra* at page 25. See: *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120 (Tex. 1996) The Court of Appeals erred in granting Nugent, Sharp and Hance summary judgment based on either qualified or personal immunity.

CONCLUSION

The portion of the Opinion wherein the Court of Appeals reversed the trial court's denial of summary judgment is procedurally unsound, unsupported by the summary judgment proof and contrary to federal substantive law and for these reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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* Counsel of Record

CAUSE NO. 136,567-C

JACK B. CROSS, PLAINTIFF	§ §	IN THE DISTRICT COURT OF
v.	§ §	WICHITA COUNTY, TEXAS
JOHN ROBERTS, LUTHER NICHOLS, PHILLIP JERGINS, R. MARK HENKHAUS, FRED McNEEL, JAMES E. NUGENT, JOHN SHARP, and KENT HANCE, DEFENDANTS.	§ § § § § § § § §	89th JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Came on for consideration, Defendants' Motion for Summary Judgment. The Court finds such Motion to lack merit.

It is accordingly ORDERED, AJUDGED(sic), and DECREED that Defendants' Motion for Summary Judgment is DENIED. All further relief not expressly granted is hereby denied.

SIGNED this 12 day of February, 1996.

Juanita Pavlick
PRESIDING JUDGE

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-96-077-CV

John Roberts, Luther Nichols	§	From the 89th District Court
Phillip Jergins, R. Mark Henkhaus	§	of Wichita County (136,567-C)
Fred McNeel, James E. Nugent,	§	August 8, 1996
John Sharp and Kent Hance	§	Opinion by Justice Brigham
vs.	§	
Jack B. Cross	§	(nfp)

JUDGMENT

The Court has considered the record on appeal in this cause and is of the opinion that there was error in the order of the trial court. The order denying summary judgment is reversed. We render judgment based on official immunity for John Roberts, Luther Nichols, Phillip Jergins, R. Mark Henkhaus, and Fred McNeel. We

render judgment based on qualified immunity for James E. Nugent, John Sharp, and Kent Hance.

It is further ordered that Jack B. Cross pay all costs in this behalf expended for which let execution issue.

William Brigham

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-96-077-CV

JOHN ROBERTS, LUTHER NICHOLS, PHILLIP JERGINS, R. MARK HENKHAUS, FRED McNEEL, JAMES E. NUGENT, JOHN SHARP and KENT HANCE — APPELLANTS

VS.

JACK B. CROSS — APPELLEE

FROM THE 89th DISTRICT COURT OF WICHITA COUNTY

OPINION

The instant interlocutory appeal stems from the trial court's denial of a motion for summary judgment based on claims of qualified and official immunity for appellants John Roberts, Luther Nichols, Phillip Jergins, R. Mark Henkhaus, Fred McNeel, James E. Nugent, John Sharp, and Kent Hance. Each of the appellants was named as a defendant in a lawsuit filed by appellee Jack

B. Cross after his dismissal from his employment at the Texas Railroad Commission ("the RRC"). Because we find the trial court improperly denied the assertions of immunity, we reverse and render judgment for appellants.

BACKGROUND

Cross was employed by the RRC on July 17, 1978. In 1984, he was assigned the duties of a "state plugger" and was to oversee contractors performing state plugging contracts. Slightly more than two years later, allegations that Cross was involved in possible misconduct in the performance of his duties surfaced. Specifically, there were questions about whether the wells had been plugged according to state regulations and whether they had been plugged as documented by Cross.

Hance, Sharp, and Nugent, commissioners at the RRC requested an investigation into Cross's performance. In the spring of 1989, RRC employees

Henkhaus, Nichols, and McNeel presented investigative findings from Roberts and Jergins to Willis Steed, the Director of Field Operation of the RRC's Oil & Gas Division, and to Rex King, the division's Assistant Director of Field Operations. Steed and King reported the findings to Hance, Sharp, and Nugent. The findings showed that Cross had not been performing his duties properly, and ultimately, Hance, Sharp, and Nugent decided to terminate Cross, an at-will employee. Cross was fired on April 17, 1989.

Cross applied for and initially received unemployment benefits through the Texas Employment Commission ("the TEC"). The RRC contested the award of those benefits, and received a favorable ruling from the TEC contest in August of 1990. In October of 1989, Cross was indicted by a Young County, Texas Grand Jury on five counts of false reporting regarding documents he had certified while working at the RRC as

a well-plugger. The criminal charges were eventually dismissed, and Cross was never tried on any of the allegations made in the indictments.

Cross sued the TEC and the RRC in September of 1990 seeking review of the TEC ruling on his unemployment benefits. Cross also named the three commissioners, as well as Roberts, Jergins, Henkhaus, McNeel, and Nichols, claiming malicious prosecution, violation of his civil rights under 42 U.S.C. § 1983, false light invasion of privacy, and intentional infliction of mental distress.

In May of 1993, the trial court dismissed the RRC and the individually named defendants in their official capacities. Hance, Sharp, and Nugent filed a motion for summary judgment on November 24, 1993. In their motion, the commissioners noted that the only claim Cross brought against them was the section 1983 claim for a constitutional deprivation of his right to a "name-

clearing hearing." They claimed that they were entitled to summary judgment because they never made any stigmatizing public charges against Cross, that the charges made against Cross were, in fact, true, that they never publicized any charges against Cross, and that Cross failed to request a hearing to clear his name.

On January 11, 1994, Roberts, Nichols, Jergins, Henkhaus, and McNeel filed a motion for summary judgment. They claimed that they were entitled to a quasi-official immunity for actions performed in good faith within the scope of their discretionary authority as public officers. Summary judgment as to both motions was denied by the trial court.

CROSS-POINT

In a sole cross-point, Cross contends that because Nugent and Hance are not currently officers of employees of the state, their interlocutory appeal ought to be dismissed. Cross relies on the Civil Practice and

Remedies Code, which authorizes interlocutory appeal from the denial of a motion for summary judgment on an assertion of immunity by "an individual who is an officer or employee of the state." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon Supp. 1996).

Cross cites no authority for this contention, and we find the converse is self-evidence. It is disputed that because Hance and Nugent were, at pertinent times, public officials, they are entitled to assert an immunity defense. When such is successfully invoked, an officer is immune from suit, not just from liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985). Immunity from suit is useless without the avenue of interlocutory appeal to challenge the denial of the affirmative defense. We find it self-evidence that where a former public official, asserting an immunity defense against claims arising from public duties, is denied summary judgment on that defense, the

former public official may appeal that summary judgment on an interlocutory basis. *See City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993). The cross-point is overruled.

POINT OF ERROR ONE

In their first point of error, the appellants contend that the trial court erred in denying Hance, Sharp, and Nugent qualified immunity to Cross's claims under section 1983. Cross claims that the commissions violated his liberty interest in his reputation and good name and the right to be afforded a meaningful hearing in which to clear his name and reputation. Cross has not brought any claim other than this section 1983 claim against Hance, Sharp, and Nugent.

The Standard of Review

In a summary judgment case, the issue on appeal is whether the movants met their summary judgment burden by establishing that no genuine issue of material

fact exists and that they were entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movants, *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301-02 (Tex. 1990), and all doubts about the existence of a genuine issue of a material fact are resolved against movants. *Cate*, 790 S.W.2d at 562; *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.*, 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. *Harwell v.*

State Farm Mut. Auto Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995); *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex. 1984). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am.*, 391 S.W.2d at 47.

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of movant's cause of action or defense as a matter of law. *City of Houston*, 589 S.W.2d at 678.

Qualified Immunity

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). But, such immunity is an

affirmative defense that the defendant official must plead. *Id.* At 815, 102 S.Ct. at 2736, 73 L.Ed.2d at 408.

Those moving for summary judgment on the basis of qualified immunity may have the burden of establishing that they were performing (1) discretionary duties (2) in good faith (3) within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994); *Antu v. Eddy*, 914 S.W.2d 166, 170 (Tex. App. – San Antonio 1995, no writ). "This immunity is based on the public policy that encourages public employees to perform their duties without fear of personal liability for negligent or improper performance." *Alanis v. University of Texas Health Science Center*, 843 S.W.2d 779, 790 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Thus, if the public employees "were performing discretionary duties in good faith, they will not be liable for torts committed while performing these duties." *Id.*

"Discretionary duties involve acts requiring personal deliberation, decision, and judgment on the part of the employee." *Id.*; *Baker v. Story*, 621 S.W.2d 639, 645 (Tex. Civ. App.–San Antonio 1981, writ ref'd n.r.e.). A state employee who "is required to pass on facts and determine his actions by the fact found" is performing "quasi-judicial" duties which are discretionary. *Torres v. Owens*, 380 S.W.2d 30, 34 (Tex. Civ. App.–Corpus Christie 1964, writ ref'd n.r.e.). To overcome such a defense, a plaintiff must show that the public employees' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.

Application of Law to Facts

The sole cause of action against Hance, Sharp, and Nugent is their alleged denial of a name-clearing hearing for Cross after his termination from the RRC.

Cross correctly notes that the merits of his section 1983 claim are not before this court on an interlocutory basis; our task is to review the summary judgment proof pertaining to the commissioners' assertion of the qualified immunity defense. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon Supp. 1996).

Cross contends that the duty to provide a discharged public employee with a name-clearing hearing is a ministerial, rather than discretionary, function and cites this court's opinion in *Burgess v. Jaramillo*, 914 S.W.2d 246 (Tex. App.--Fort Worth 1996, no writ). *Burgess* is instructive, although not to support Cross's contention. In *Burgess*, we noted that "a significant aspect of the process of determining whether [an] act is ministerial or discretionary involves searching for a law or regulation controlling the acts of the officer in a particular situation." *Id.* At 249 (citing *Harris County v. DeWitt*, 880 S.W.2d 99, 101 (Tex. App.--Houston [14th Dist.] 1994,

aff'd, 904 S.W.2d 650 (Tex. 1995)). In *Burgess*, the ministerial act was an employer's verification of the employment eligibility of a job applicant and the employer's rejection of a particular document to provide proof of citizenship status. *Id.* At 248.

The summary judgment proof establishes that all of the actions taken by the commissioners required them to exercise personal deliberation and judgment throughout the events giving rise to this cause of action. Each of the commissioners stated that he instructed those investigating Cross's performance to keep the information confidential, that he had never made any public charges about Cross or his termination, and that he had never authorized the making of any public statements about Cross or his termination. Each of the commissioners stated that he reached the conclusion that Cross had not performed his work satisfactorily on the basis of recommendations from the RRC's Oil & Gas

director and assistant director, and each of the commissioners stated that he had not received a request from Cross or from anyone working on Cross's behalf for a name-clearing hearing.

Included in the summary judgment proof was an April 30, 1989 letter written by Cross to the commissioners, in which he complained about his termination and asked the commissioners to "look into this matter." The letter was written within two weeks of Cross's termination, and Cross conceded that the letter was written before he was indicted on criminal charges. Also included in the summary judgment proof was a typewritten biography of Cross from his wife, dated June 21, 1989, and a handwritten letter from Cross's wife asking the commissioners to review the documents she provided. This, too, was written before Cross was indicted and before the criminal charges were publicized

in the newspaper, and Cross conceded that the materials from his wife did not request a name-clearing hearing.

The summary judgment proof established that Cross was an at-will employee about whose job performance suspicions had arisen, that the commissioners ordered an investigation into his performance, that the investigation findings gave the commissioners reason to terminate Cross, and that the commissioners had neither authorized disclosure of the investigation (to anyone other than law enforcement authorities) nor made statements regarding the investigation to the public. The summary judgment proof also established that, although Cross and his wife repeatedly asked the commissioners to reconsider their decision to terminate Cross, neither he nor his wife asked for a name-clearing hearing <u>after the criminal charges were brought and made public</u>. We conclude that at all relevant times, the commissioners were exercising their

decision making abilities in the furtherance of discretionary, rather than ministerial, duties. We also conclude that their failure to offer Cross a name-clearing hearing, when they had never been asked to do so, was objectively reasonable. Point of error one is sustained.

POINT OF ERROR TWO

In their second point of error, the appellants contend that the trial court incorrectly denied them summary judgment because as a matter of law Roberts, Nichols, Jergins, Henkhaus, and McNeel are entitled to official immunity. Cross sued the named defendants for intentional infliction of mental suffering and malicious prosecution, and the defendants/appellants filed a motion for summary judgment claiming official immunity.

Government employees may assert the affirmative defense of official immunity from suit arising from discretionary duties performed in good faith provided that the employees were acting within the scope of their

authority. *City of Lancaster*, 883 S.W.2d at 653. Cross concedes that Roberts, Nichols, and McNeel were performing discretionary duties within the scope of their authority but maintains that they did not conclusively establish that they were acting in good faith. Cross implicitly concedes that Henkhaus was performing discretionary duties within the scope of his authority by arguing only that Henkhaus did not establish that he, too, was acting in good faith.

The Claim Against Roberts

Because Cross does not dispute that Roberts was performing discretionary functions in the course and scope of his authority, our review is limited to whether Roberts conclusively established that he was acting in good faith. Our inquiry, then, focuses on whether Roberts's actions were "objectively reasonable:"

> Although the cases sometimes refer to the doctrine of qualified "good faith" immunity, the test is one of objective

> reasonableness, without regard to whether the government official acted with subjective good faith. "[W]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."
>
> ....
>
> The "could have believed" aspect of the good faith test means that in order to be entitled to summary judgment, an officer must prove that a reasonably prudent officer might have believed that the [official action] should have been continued.

City of Lancaster, 883 S.W.2d at 656-57.

Roberts is an engineering specialist and lead technician for the RRC and was assigned by McNeel to assist in the investigation into allegations Cross improperly plugged wells. Roberts made an initial visual examination of approximately five wells which had been plugged under Cross's supervision and during that

investigation, found that some of the wells were partially open. Roberts concluded that, because cement was not visible in the well bore, the wells had not been plugged according to RRC rules and procedures. After Roberts reported those initial findings, he was assigned to assist in a full-scale investigation of wells plugged under the supervision of Cross, and he again found improperly plugged wells.

Roberts was aware from the beginning of the investigation that he was not to release any information and followed those instructions. He concluded after an extensive investigation involving wells in at least three counties that non of the twenty-two wells he examined were properly plugged. Roberts also noted that the cement-like substance used in the wells plugged under Cross was of poor quality and improper consistency. Although Roberts took samples during the investigation and gave his notes to McNeel, Nichols, and Henkhaus,

he did not make the recommendation to terminate Cross, nor did he made the decision to terminate him. Roberts was not involved in the decision to pursue criminal charges against Cross, and he did not testify before the grand jury investigating the claims.

Roberts was asked by his superiors at the RRC to conduct an investigation after allegations surfaced regarding improper plugging of wells supervised by Cross. Roberts conducted an initial examination which revealed consistent problems, and then he participated in a more extensive examination. His conclusions were that the wells had been improperly plugged and that there appeared to be a flaw in the technique and substance used. Based on the summary judgment proof, we conclude that Roberts could have reasonable believed his actions to be lawful and that the trial court erred in ruling that he did not have official immunity.

The Claim Against Nichols

Nichols is both an investigator for the Investigations Division of the RRC and a licensed peace officer in the State of Texas. As an investigator for the RRC, Nichols was charged with examining allegations of employee wrongdoing, including theft, fraud, and other illegal activities. Nichols's attention was drawn to Cross during an investigation into an independent contractor plugging wells in Knox County. When the contractor claimed that he was plugging wells according to the state-funded plugging program, Nichols was instructed to investigate the state plugger who had supervised the independent contractor. Nichols learned that Cross had supervised the independent contractor, and Nichols accompanied Roberts on the initial investigation of the five Cross-supervised plugged wells. Ultimately, Nichols accompanied Roberts to other wells during the investigation.

Nichols was advised by Henkhaus "during the first evening of the investigation" that the inquiry was to be kept confidential, and he was given similar instructions later from the Young County District Attorney.

Nichols, as an investigator, was required to make detailed notes and work with the local and county law enforcement officials regarding potentially illegal activities. Although his notes and findings were eventually given to the Young County District Attorney, they reflected his honest opinion of the work done on the plugged wells. Nichols did not make the decision to release the materials to the district attorney, although he concluded that there was probable cause to present the findings to the district attorney and the grand jury. Nichols was not involved in the decision to terminate Cross. Because Cross does not dispute that Nichols was performing discretionary duties within the scope of his authority, our inquiry must focus on whether his actions

appear objectively reasonable. We find that they do and that the trial court's denial of his motion for summary judgment based on official immunity was error.

The Claim Against Jergins

Jergins was the engineering technician who discovered irregularities in the plugging performance by an independent contractor whose work was supervised by Cross. It was after Jergins called the irregularities to the attention of the contractor that he learned Cross had overseen the contractor's work. Jergins was subsequently asked to help Henkhaus locate two Baylor County wells that Jergins had previously located for Cross. This was the extent of Jergin's involvement in the events leading up to the investigation and dismissal of Cross. The trial court erred in ruling that Jergins had not conclusively established that he was performing discretionary functions within the scope of his authority and doing so in good faith.

The Claims Against Henkhaus

Henkhaus was, at all relevant times, the assistant district director for the RRC's District 09, the district in which Cross worked as state plugger. Henkhaus was assigned to locate and re-enter the wells plugged by the independent contractor whose work Cross supervised and whose work Jergins noted was inadequate. Henkhaus was assigned to lead the investigation into the wells plugged under Cross's supervision by the director and assistant director of field operations for the Oil & Gas Division of the RRC. Henkhaus kept all of his investigative files and notes confidential and followed instructions that he not release any information about Cross to anyone but Henkhaus's supervisors. We find it abundantly clear that Henkhaus was performing discretionary functions within the scope of his authority and that he could have concluded his actions were lawful in light of clearly established state law.

The Claim Against McNeel

McNeel is the district director of RRC District 09, the district in which Cross worked as state plugger. As such, he was charged with ensuring that all statewide rules, regulations, policies and procedures of the RRC were followed, and was required to report any possible employee misconduct to the Field Operations Section of the RRC's Oil & Gas Division.

McNeel learned form investigator Nichols that some wells had been improperly plugged by an independent contractor under Cross's direction. McNeel related this information to the Field Operations Section, which instructed him to cooperate with Nichols's investigation. McNeel met with Henkhaus, Cross, and others about the allegations of wrongdoing and was aware of the decision to uncover other wells plugged by the contractor under Cross's supervision.

McNeel was aware of what he called a "gag order" regarding disclosure of the Cross investigation, and he stated that he has never spoken publicly about the investigation or allegations. He never discussed the matter with any reporter or representative with any newspaper. McNeel terminated Cross on the instruction of Willis Steed, the director of field operations. He, too, could have reasonable believed that he was acting in compliance with established law and was entitled to official immunity.

The affirmative defense of official immunity has evolved out of a public policy that encourages public officers to carry out their duties without fear of personal liability. *Carpenter v. Barner*, 797 S.W.2d 99, 101 (Tex. App.–Waco 1990, writ denied). The competent summary judgment proof establishes that Cross came under scrutiny after the work of an independent contractor was questioned, that the RRC conducted an extensive

investigation into Cross's performance, and that Cross was terminated only after the investigation of more than twenty plugged wells. The information garnered during the investigation was forwarded to county law enforcement officials because the RRC employees believed that laws might have been violated, and the RRC employees did not discuss the investigation with outsiders. We can find no more compelling case for the assertion of official immunity than one involving government employees attempting to determine whether tasks performed at public expense have been done properly. Point of error two is sustained.

The judgment of the trial court is reversed and judgment is rendered for appellants Hance, Sharp and Nugent on their qualified immunity defense and for appellants Roberts, Nichols, Jergins, Henkhaus, and McNeel on their official immunity defense.

WILLIAM BRIGHAM
JUSTICE

PANEL B: RICHARDS, BRIGHAM, AND HOLMAN, JJ.

DO NOT PUBLISH
TEX. R. APP. P. 90(c)

AUG 08 1996

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

JOHN ROBERTS, LUTHER NICHOLS, PHILLIP JERGINS, R. MARK HENKHAUS, FRED McNEEL, JAMES E. NUGENT, JOHN SHARP and KENT HANCE	§	NO. 2-96-077-CV
v.	§	
JACK B. CROSS	§	

ORDER

On this day the Court considered the motion of appellee, Jack B. Cross, for rehearing and appellants' response, and appellee's motion to reconsider court's determination not to publish the opinion.

The motion to reconsider court's determination not to publish the opinion is **DENIED**.

It is the opinion of this Court that said motion for rehearing should be and is hereby overruled and that the opinion and judgment of August 8, 1996, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

SIGNED THIS 26th day of September, 1996.

WILLIAM BRIGHAM
JUSTICE

PANEL B: RICHARDS, BRIGHAM, and HOLMAN, JJ.

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 12, 1997

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RE: Case Number 96-1144
Style: JACK B. CROSS
v.
LUTHER NICHOLS, A. MARK HENKHAUS, JAMES E. NUGENT, JOHN SHARP and KENT HANCE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by_____
Michael Kopp, Deputy